

Agreement and Certification

For use in Insurance Upon Completion Cases

U.S. Department of Housing
and Urban Development
Office of Housing
Federal Housing Commissioner

This Agreement is effective as of the _____ day of _____, by and among _____ (hereinafter, the Mortgagor), and _____ (hereinafter, the Mortgagee), and _____ (hereinafter, the General Contractor), and the Secretary of Housing and Urban Development, acting through the Federal Housing Commissioner (hereinafter, the Commissioner).

The Mortgagor has applied to the Mortgagee for a mortgage loan (hereinafter, the Mortgage Loan) for the purpose of constructing or substantially rehabilitating a housing project identified as HUD Project No. _____, the work to be performed by the General Contractor; and the Mortgagee has applied to the Commissioner for insurance of the Mortgage Loan.

The Commissioner has issued a Commitment to insure the Mortgage Loan in the amount of \$ _____, under Section _____ of the National Housing Act, as amended, and regulations and directives issued pursuant thereto. The amount of the Mortgage Loan is subject to reduction, as provided in the said Act, regulations and directives, and this Agreement is required accordingly.

In consideration of the premises, the parties acknowledge and agree as follows:

1. In consideration of the agreement by the Mortgagee to make the Mortgage Loan and as an inducement to the Commissioner to insure the Mortgage Loan, the Mortgagor agrees to submit to the Commissioner prior to endorsement of the Mortgage Loan for insurance a fully completed and executed Mortgagor's Certificate of Actual Cost; and, if required, a fully completed and executed Contractor's Certificate of Actual Cost, or Subcontractor's Certificate of Actual Cost, on forms prescribed by the Commissioner. The Mortgagor and the General Contractor understand, agree and will insure that each of the certificates of cost is supported by the certificate of an independent Certified Public Accountant or independent public accountant in form acceptable to the Commissioner. The Mortgagor further agrees that if the Commissioner, for cost certification purposes, accepts estimates for any items, the Mortgagor will, at the time of endorsement, establish a cash escrow to pay all the "to be paid in cash items" identified in its Certificate of Actual Cost, and to pay debts to third parties who made the original disbursement for an item listed as paid on the Certificate, unless documentation, satisfactory to the Commissioner, is submitted evidencing that the Mortgagor paid these amounts after the submission of its Certificate. The Mortgagor understands that the items covered by this cash escrow must be paid within 45 days of the date of endorsement, except for those items in dispute or involved in litigation. If the Mortgagor's actual cost is less than the estimates accepted for cost certification purposes, and the Commissioner determines that this difference plus the net amount (total receipts less expenses of perfecting claims) of settlement of claims against bonding companies or others, would have required a reduction of the Mortgage Loan, the Mortgagor understands that prepayment of the Mortgage Loan is required in an amount equal to the scheduled monthly principal payments, to the extent possible, and any remaining balance will be deposited to the project's Reserve Fund for Replacements.

2. The Mortgagor and Mortgagee agree that prior to endorsement of the Mortgage Loan for insurance, the Commitment and Mortgage Loan may be reduced as required to comply with the provisions of Section 227 of the National Housing Act, as amended, and the regulations and directives issued pursuant thereto. The Mortgagor and Mortgagee further agree to execute such instruments as may be required to accomplish such reduction, and the Mortgagee agrees that the Mortgage Loan will be reduced accordingly.

3. The Mortgagor certifies that any financial or business interests or family relationships which exist between Mortgagor, or any of its officers, directors, stockholders, partners or principals (hereinafter, Principals), with the Architect or with the General Contractor, or subcontractors, suppliers, or equipment lessors, or with any of the Principals of any the foregoing entities (hereinafter, an Identity of Interest), for the project are herewith listed by name, title, address, relationship and interest: *(Attach exhibit if necessary. If None, so state).*

4. The Mortgagor agrees to notify the Commissioner in writing, and within 10 days of the event, of any change in relationships covered by paragraph 3 herein. In the event that such change establishes an Identity of Interest between the Mortgagor or its Principals, and the General Contractor or its Principals, the Mortgagor's Certificate of Actual Cost will be accompanied by the Contractor's Certificate of Actual Cost, in the form prescribed by the Commissioner; and, if required by the Commissioner, similar certificates by any subcontractor, supplier, or equipment lessor covered by this paragraph 4. It is agreed that the absence of such notice may be treated by the Commissioner as a representation that no such change in relationship has occurred.

5. The Mortgagor agrees to maintain and keep adequate records of all costs incurred in connection with the project, and to make such records available for examination by the Commissioner upon request.

6. If this Agreement discloses an Identity of Interest between the Mortgagor and the General Contractor, the Mortgagor will include in the construction contract a provision requiring the General Contractor, upon completion of the project, to submit to the Mortgagor for delivery to the Commissioner its Certificate of Actual Cost, in the form prescribed by the Commissioner. The Mortgagor further agrees to include in said contract the requirement that the General Contractor will maintain adequate records of all such costs, and make such records, documents, contracts and accounts available for review upon request by the Commissioner.

7. The Mortgagor agrees that it will include in the construction contract, and require the inclusion in all subcontracts, whether for labor, material, or equipment leases, a provision that if there is, or comes into being, an Identity of Interest between the Mortgagor and any subcontractor; or, in those cases in which the General Contractor is required to certify actual costs, between the General Contractor and any subcontractor, then, if the Commissioner so requires, such subcontractor will submit to the Commissioner a Certificate of Actual Cost in the form and with the audit standards prescribed by the Commissioner, including the deduction of all kickbacks, rebates, adjustments, discounts, or any other arrangements in the nature thereof. For purposes of determining actual cost, no profit or general overhead may be included in the subcontract unless the Commissioner has granted advance written approval of a specific dollar amount or a specific percentage.

8. The Mortgagor agrees that if there comes into being any Identity of Interest between the Mortgagor and the Architect, or between the General Contractor and the Architect, the Architect will immediately be relieved of inspection duties and the maximum Architect's fees allowable for cost certification purposes will be \$_____ for design services only, and no fees will be allowed for supervision.

9. If the Commissioner processed the project to include a Builder's and Sponsor's Profit and Risk Allowance (hereinafter, BSPRA) under the National Housing Act, as amended, the Mortgagor and General Contractor agree as follows:

a. The form of construction contract will be cost-plus, with a maximum upset price. So long as the requisite Identity of Interest is maintained through endorsement of the Mortgage Loan, and subject to paragraph 9.c herein, then in lieu of the General Contractor's fee, the Mortgagor will be entitled to include in its Certificate of Actual Cost a BSPRA. The BSPRA will be determined by applying the profit and risk percentage provided for in Section 227 of the National Housing Act, as amended, and the regulations and directives issued pursuant thereto, that were in effect on the date the Commitment, to the actual cost, as accepted by the Commissioner, of those items which, under the provisions of the said Act, regulations and directives, are included in computing the BSPRA. For the purpose of determining actual cost, the General Contractor's general overhead will not exceed \$_____.

b. If the Identity of Interest between the Mortgagor and General Contractor is not maintained through endorsement of the Mortgage Loan, then the BSPRA provided for in paragraph 9.a herein will not be applicable. Instead, the Mortgagor will be entitled to include in its Certificate of Actual Cost a Sponsor's Profit and Risk Allowance (hereinafter, SPRA). The SPRA will be determined by applying the profit and risk percentage provided for in Section 227 of the National Housing Act, as amended, and the regulations and directives issued pursuant thereto, that were in effect on the date the Commitment, to the actual cost, as accepted by the Commissioner, of those items which, under the provisions of the said Act, regulations and directives, are included in computing the SPRA.

c. If more than 50 percent of the actual cost of construction is subcontracted with any one contractor or subcontractor, or more than 75 percent with three or fewer contractors or subcontractors (hereinafter, the 50-75% Rule), the BSPRA provided for in paragraph 9.a herein will not be allowed as an actual cost, and the Mortgagor will be limited to the inclusion on its Certificate of Actual Cost of the SPRA cited in paragraph 9.b herein. Further, in that event, for the purpose of determining actual cost, the Commissioner will not allow any expense for the General Contractor's general overhead.

10. If the Commissioner did not process the project to include a BSPRA, the Mortgagor and General Contractor agree that the provisions of this paragraph 10 apply. If there is an Identity of Interest between the Mortgagor and the General Contractor, or in any other circumstance required by the Commissioner, the form of construction contract will be cost-plus, with a maximum upset price. For the purpose of determining actual cost, the General Contractor's fee will not exceed \$_____, and the general overhead will not exceed \$_____. In the event that the 50-75% Rule is violated, for the purpose of determining actual cost, the Commissioner will not allow any expense for the General Contractor's fee and general overhead. If an Identity of Interest does not exist or is not maintained through endorsement of the Mortgage Loan, and if authorized by the National Housing Act, as amended, and the regulations and directives issued pursuant thereto, that were in effect on the date of the Commitment, the Mortgagor will be allowed to include in its Certificate of Actual Cost the SPRA cited in paragraph 9.b of this Agreement.

11. The Mortgagor and the General Contractor understand that for purposes of the 50-75% Rule, the terms "contractor" and "subcontractor" include material suppliers and equipment lessors, and any two or more contractors or subcontractors having an Identity of Interest or common ownership are considered as one contractor or subcontractor. Further, it is understood that the 50-75% Rule is not applicable to manufacturers of industrialized housing, trade items performed by persons on the General Contractor's payroll, mobile home park programs, supplemental loan programs, or rehabilitation programs other than gut rehabilitation.

12. The Mortgagor and the General Contractor further understand and agree that if an Identity of Interest arises between the Mortgagor and the General Contractor following their execution of a lump-

sum form of construction contract, allowable costs will be governed by the applicable provisions of paragraphs 10 and 11 of this Agreement.

13. The Mortgagor herewith submits signed copies of any collateral agreement(s) or side deal agreement(s) executed by the Mortgagor or any of its officers, directors, stockholders, partners or principals, creating, supporting or otherwise evidencing any Identity of Interest or financial obligation of any kind made in connection with the project. The Mortgagor further agrees to obtain the approval of the Commissioner before entering into any such agreement after executing this Agreement. For the purposes of this paragraph, "collateral agreement" or "side deal agreement" does not include those agreements disclosed by the Mortgagee.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

The foregoing agreement, undertaking, statement or certification has been made, presented and delivered for the purpose of influencing an official action of the Federal Housing Administration and the Federal Housing Commissioner, and may be relied upon by the Commissioner as a true statement of the facts contained therein.

MORTGAGOR

MORTGAGEE

By: _____

By: _____

Print name and title

Print name and title

GENERAL CONTRACTOR

FEDERAL HOUSING COMMISSIONER

By: _____

By: _____

Print name and title

Print name

Authorized Agent